CHAM YOON LIANG

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
MOHTAR ABDULLAH JC
[FT TERRITORY CRIMINAL APPLICATION NO. 44-9-89]
22 JULY 1989

CONSTITUTIONAL LAW: *Unlawful detention - Dangerous Drugs Act 1952 - Dangerous Drugs (Special Preventive Measures) Act 1985 - Article 5(2) of the Federal Constitution - Writ of habeas corpus.*

The appellant alleges (a) that he was arrested on 11 February 1989 by the police in purported exercise of the powers under the Dangerous Drugs Act 1952, (b) that on 25 February 1989 the applicant was further detained by the police in purported exercise of the powers under the Dangerous Drugs (Special Preventive Measures) Act 1985; (c) that in spite of being detained by the police for a total of 74 days, no charges were referred against him in a Court of law, (d) on 22 April 1989 a detention order was made against him by the Deputy Minister of Home Affairs whereby the applicant be detained for a period of 2 years with effect from 25 April 1989.

The applicant contended that the detention order exceeded two years in violation of s. 6(1) of the Act and is therefore illegal, unlawful and unconstitutional. There is no specific challenge as to the validity of the detention prior to the detention order. However, in a *habeas corpus* proceedings, it is incumbent upon the detaining authorities to justify the detention by the production of the relevant lawful detention order or authorisation.

Held:

[1] As far as the detention order by the Minister is concerned, the Minister had acted *bona fide* and in accordance with the law.

[2] The detention of the applicant for the first 48 hours would seem to be lawful. However, for the subsequent detention, the detention is not in accordance with the law, as such the detention is bad and the person is entitled to be released forthwith. The initial permit of the detention being proved to be technically defective, the continued detention of the applicant is consequently bad in law.

[3] A formal order of *habeas corpus* will be made and the applicant will be set free.

Legislation referred to:
Criminal Procedure Code, s. 117
Dangerous Drugs (Special Preventive Measures) Act 1985, s. 6(1)

For the applicant - Tan Hock Chuan; M/s. Kam Woon Wah & Co.
For the respondents - Abu Samah bin Nordin (SFC)

JUDGMENT

Mohtar Abdullah J:

The applicant alleges:

(a) that he was arrested on 11 February 1989 by the police in purported exercise of the powers under the Dangerous Drugs Act 1952 (Act 234);

(b) that on 25 February 1989 the applicant was further detained by the police in purported exercise of the powers under the Dangerous Drugs (Special Preventive Measures) Act 1985 - hereinafter referred to as "the Act.";

(c) that in spite of being detained by the police for a total of 74 days, no charges were preferred against him in a Court of law;

Subsequently on 22 April 1989 the Deputy Minister of Home Affairs (hereinafter referred to as "the Minister") made a detention order directing that the applicant be detained for a period of two years with effect from 25 April 1989 i.e. until 24 April 1991. The detention order is dated 22 April 1989. By s. 6(1) of the Act, "the Minister may ... by order ... direct that such person be detained for a period not exceeding two years **from the date of such order**." It is the applicant's contention that the term "from the date of such order" in s. 6(1) refers to the date on which the Minister made or signed the detention order i.e. 22 April 1989 and not the date "25 April 1989" which was the date the period of detention was stated to commence. Therefore the 2 years period of detention should commence from the date of making or signing the order i.e. 22 April 1989 and should end on 21 April 1991. In circumstances, the applicant submits that since the detention order authorises the detention of the applicant until 24 April 1991, it has therefore exceeded the two years period in violation of s. 6(1) and is therefore illegal, unlawful and unconstitutional.

From the language of s. 6(1) and the whole scheme of the Act I find the detention order signed by the Minister on 22 April 1989 authorising the detention of the applicant for a period of 2 years from 25 April 1989 is correct proper and not in violation of s. 6(1) of the Act. The Minister, by his affidavit, has stated that he was satisfied that the applicant has associated himself in activities relating to dangerous drugs, and that it was necessary in the interest of public order that the applicant be detained. He further averred that "the detention order against the applicant was made in good faith and that the Act has been properly applied to the applicant." I must stress here that the Court does not question the satisfaction of the Minister so unequivocally stated, nor doubt the *bona fide* of the Minister and that as far as the actions of the Minister is concerned, the Minister has properly applied the Act to the applicant.

However the same cannot be said as regards the actions of the police officers who involved in the detention of the applicant prior to the making of the detention order by the Minister.

In this application, evidence is by affidavits in support of each party's case. The applicant produced three affidavits, two affirmed by him on 28 June and 2 July 1989 and one by his wife affirmed on 21 July 1989.

The respondents produced six affidavits viz:

(i) two affidavits of ASP Zakaria one affirmed 12 July 1989 and a supplementary affidavit affirmed on 21 July 1989.

(ii) Affidavit of Khairiyah Binti Md. Shahabudin (an Assistant Secretary attached to the Ministry of Home Affairs) affirmed on 12 July 1989, and

(iii) Affidavit of the Minister also affirmed on 12 July 1989.

(iv) Affidavit of DSP Haji Hasbullah Bin Yusoff affirmed on 21 July 1989.

(v) Affidavit of Inspector Dzulkifli Bin Haji Asmawi affirmed on 21 July 1989.

The applicant contends specifically that the detention order is illegal, unlawful and unconstitutional. There is no specific challenge to the legality of the detention from 11 February 1989 up ton the issuance of the detention order. However, I hold that in a *habeas corpus* proceedings under Cap. XXXVI of the Criminal Procedure Code and where the evidence by the various affidavits shows that the detainee has been under continuous detention purportedly under separate laws or by separate authorisation, it is incumbent upon the detaining authorities to justify the detention by the production of the relevant lawful detention order or authorisation. In the circumstances I have allowed both the applicant and the respondents to file further affidavits to cover the relevant periods of detention. Hence, the supplementary affidavit of ASP Zakaria and the affidavits of DSP Haji Hasbullah and Inspector Dzulkifli are filed by the respondents, and the affidavit of the applicant's wife is filed by the applicant.

The respondents have discharged the onus placed on them in respect of the two years detention at Pusat Pemulihan Akhlak, Muar, by the production of the detention order by the Minister. In respect of the periods of detention by the police, the respondents produced firstly the affidavit of ASP Zakaria who averred as follows:

(a) that he arrested and detained the applicant for the purpose of investigations under s. 3(1) of the Act, and lodged a Police Report (Exhibit ZA1);

(b) that on 27 February 1989 at about 11.30 a.m., he authorised the further detention of the applicant for an **additional period beyond forty-eight hours** under s. 3(2)(b) of the Act (Exhibit ZA2).

I note that, despite the leave granted by the Court to file further affidavits, there is no affidavit by any police officer affirming the validity of the detention of the applicant from 11 February 1989 until 25 February 1989 under the Dangerous Drugs Act. No order of any Magistrate under s. 117 of the Criminal Procedure Code, if any, is produced to cover the detention of the applicant beyond the initial 24 hours of the original arrest on 11 February 1989. I am aware it would normally be the practice, as required by law, for the police to produce a suspect before a Magistrate for an order under s. 117 of the Criminal Procedure Code - but the Court cannot assume that the police had done so in the present case! In the circumstances a doubt exists as to whether the detention of the applicant for this initial 14 day period is lawful or not.

Under the Act the police can detain the applicant, for purpose of investigation, for a period of 60 days. The provisoes in s. 3(2) are very clear as regards the continued detention of the applicant under s. 3:

(a) he shall not be detained for more than twenty four hours except with the authority of a police office of or above the rank of Inspectors;

(b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;

(c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by him in that behalf and the Inspector-General or police officer so designated by him, as the case may be shall forthwith report the same to the Minister.

As affirmed by ASP Zakaria the applicant was arrested under s. 3 of the Act at 2.20 p.m. on 25 February 1989.

Therefore: (i) the 24th hour would be 2.20 p.m. on 26 February 1989;

(ii) the 48th hour would be 2.20 p.m. on 27 February 1989;

(iii) the 14th day would commence from 2.20 p.m. on 11 March 1989.

The detention of the applicant for the first 24 hours is unquestionably valid. For the next 24 hours, there is the affidavit by Inspector Dzulkifli who produced the relevant authorisation under s. 3(2)(a) to affirm the validity of the detention for the period beyond 24 hours. The detention of the applicant for the first 48 hours would seem to be lawful.

ASP Zakaria affirmed that on 27 February at 11.30 a.m., he authorised the further detention of the applicant beyond 48 hours under s. 3(2)(b). A copy purportedly of the said authorisation under s. 3(2)(b) was produced and marked Exhibit ZA2. When I peruse the said Exhibit ZA2 I find that it is in fact an authorisation under s. 3(2)(c), authorising the further detention of the applicant for an additional 46 days from 2.20 p.m. on 27 February 1989. This means that on record ASP Zakaria was authorising the detention of the applicant under s. 3(2)(c) until 2.20 p.m. on 14 April 1989.

From the affidavit of ASP Zakaria and Exhibit ZA2 there seem to be no proper authorisation under s. 3(2)(b) for the detention of the applicant beyond 48 hours. The mere averment by ASP Zakaria in his affidavit to that effect, without the production of the relevant authorisation, is insufficient to discharge the burden on the respondent to show lawful detention under s. 3(2)(b). There also seems to be no proper authorisation under s. 3(2)(c) for the detention of the applicant beyond 14 days because:

firstly: ASP Zakaria is below the rank of a Deputy Superintendent stipulated in s. 3(2)(c);

secondly: assuming for a moment that ASP Zakaria is a properly authorised officer there is no affirmation by ASP Zakaria that, in accordance with the requirement of s. 3(2)(c), he has reported the matter to the Inspector-General (or to a police officer designated by the Inspector-General);

and thirdly: Even assuming again that the authorisation by ASP Zakaria under s. 3(2)(c) is valid, there is a gap of about 11 days from 14 April (the 46th day) to 25 April (the commencement of the 2 years detention under the detention order) unaccounted for or not covered by any lawful authorisation for detention.

To overcome this problem, the respondents produce the supplementary affidavit of ASP Zakaria and the affidavit of DSP Haji Hasbullah.

Let me deal first with ASP Zakaria's supplementary affidavit wherein he stated *inter alia*:

(a) that he did authorise the further detention of the applicant for an additional period beyond 48 hours under s. 3(2)(b) but "by mistake of fact" different from as in Exhibit ZA2 was used (i.e. the form for authorisation under s. 3(2)(c));

(b) that there are no prescribed forms under s. 3(2)(b) and (c) of the Act and that the cyclostyled forms adopted by the police are intended for administrative convenience and record purposes only.

I agree that the Act does not prescribe the forms to be used - but the forms to be used and in fact used by the police (as seen in the exhibits attached to the affidavits of these 3 police officers) are authorised by the Attorney-General's chambers. All the forms carry the note, at the bottom, as follows: "Borang ini diluluskan oleh Jabatan Peguam Negara mengikut surat PN (PU2) 437 bertarikh 22hb. Julai, 1985.' These are forms officially sanctioned for the purposes of the exercise of the powers of detention as stipulated by the respective provisos of s. 3 and in fact used as documentary proof of lawful custody thereof in every *habeas corpus* proceedings under the Act. For a police officer to affirm that the authorisation forms are merely for administrative convenience and record purpose only is regretfully a misconceived view of a police officer's responsibility under the Act. The use of the wrong form cannot be a mere irregularity in view of the fact that each form prescribes for the different exercise of powers under different provisions of the law by officers of different ranks.

I deal now with the affidavit of DSP Haji Hasbullah who produced the proper form of authorisation under s. 3(2)(c) to justify the applicant's detention beyond 14 days, with effect from 10.20 a.m. on 11 March 1989. In his affidavit, DSP Haji Hasbullah affirmed that "on 3 March 1989 I reported the circumstances of the arrest and detention of one Cham Yoon Liang to Senior Assistant Commissioner 1 Mohd. Ghazali Bin Yaacob." There is no averment by DSP Haji Hasbullah that he reported to the Inspector-General or the Senior Assistant Commissioner 1 Mohd. Ghazali was a "police designated by the Inspector-General in that behalf" under s. 3(2)(c). The proviso in s. 3(2)(i) is strict and clear - the DSP shall report, not to any superior police officer, but to the Inspector-General himself or to a particular police officer designated by the Inspector-General for this purpose! The rationale for this provision is clear - the highest ranking police officer or a special police officer designated by him should be informed before the subject is to deprived of his liberty for a longer period. It is then the duty of the Inspector-General or this designated officer to forthwith report the matter to the Minister. I therefore hold that DSP Haji Hasbullah's affidavit does not show the procedural requirement in s. 3(2)(c) has been complied with. The submission from the bar that Senior Assistant Commissioner 1 Mohd. Ghazali is in fact the officer so designated by the Inspector-General is insufficient to discharge the burden on the respondents to show due compliance with the requirement of s. 3(2)(c).

In any event, as I see it, no police officer who knows his rank, who understands Bahasa Malaysia and who reads (as he should) the form he is issuing to authorise the detention of a subject under the Act can honestly plead "mistake of fact" in using the wrong form. If, in fact, he actually makes that mistake, it is a clear reflection of the fact that he has not applied his mind to the proper exercise of his power under the relevant section of the Act.

I therefore hold:

(a) that the respondent has failed to produce the authorisation under s. 3(2)(b) for the detention of the applicant beyond 48 hours, and

(b) that the wrong use of Exhibit ZA2 by ASP Zakaria is not a mere "factual irregularity" but constitute a breach of the law and procedure prescribed in s. 3(2)(b) and (c) of the Act, and

(c) that, even assuming that s. 3(2)(c) has been complied with by the evidence adduced from the affidavit and authorisation by DSP Haji Hasbullah, there would be on record before this Court two sets of authorisation under s. 3(2)(c) by two different officers which would cast doubt on the propriety of the two police officers' actions and the lawfulness of their respective orders in the circumstances of this case.

In find that there are large gaps in the respondents' case in that some of the actions of the police officers in arresting and detaining the applicant have not been properly and conclusively shown to be made in accordance with the procedure and powers provided either under s. 117 of the Criminal Procedure Code or under s. 3 of the Act.

Although I find, as stated earlier, that the Minister has acted *bona fide* and in accordance with law as far as his actions are concerned, the vital defects in respect of the earlier periods of detention by the police would make the whole detention bad. (See *Koh Yoke Koon's* case).

In *Ex Parte Johannes Choeldi & Ors.*, Rigby J said to the effect that where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical effects which may invalidate the order which deprives him of his liberty.

Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith.

The initial periods of the detention being proved to be technically defective, I have no alternative but to hold that the continued detention of the applicant is consequently bad in law.

I therefore made a formal order granting *habeas corpus* and setting the applicant free.

Also found at [1989] 2 CLJ 993